84-596

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ALEXANDER L. STEVAS,
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No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN DISALVO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Did the court below fail to follow the decisions of this Court as well as its own precedents regarding the admissibility of coconspirator statements by affirming this conviction which resulted from the improper admission of coconspirator statements without independent, non-hearsay evidence of John DiSalvo's participation in the conspiracy?

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v.

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PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John DiSalvo hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at No. 83-1756.

OPINIONS BELOW

The Court of Appeals affirmed petitioner's conviction by judgment order filed June 21, 1984 which is reproduced at A-1. On August 14, 1984, a petition for rehearing en banc was denied; that order is reproduced at A-3.

The District Court's oral opinion in rendering its verdict in the non-jury trial was transcribed and is appended, in pertinent part, at A-6.

JURISDICTION

John DiSalvo was convicted in a non-jury trial upon indictment No, 83-00041 in the United States District Court for the Eastern District of Pennsylvania charging him with conspiracy to distribute methamphetamine and related charges. Mr. DiSalvo was sentenced to eleven years imprisonment to be followed by four years probation and was admitted to bail pending appeal. His conviction was affirmed by the United States Court of Appeals for the

Third Circuit on June 21, 1984, and rehearing en banc was denied on August 14, 1984. (A-3) Issuance of the mandate was stayed to October 13, 1984 by order dated September 6, 1984. (A-5)

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The issue presented calls upon this Court to construe and apply the Fifth and Sixth Amendments to the Constitution of the United States which provide in pertinent part:

> "No person shall be...deprived of life, liberty or property, without due process of law...."
> USCS Constitution, Amendment Five
>
> and
>
> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...."
> USCS Constitution, Amendment Six

STATEMENT OF THE CASE

I. Procedural History of the Case

On February 1, 1983, a federal grand jury in the Eastern District of Pennsylvania returned a multi-count indictment charging John DiSalvo and several other persons with conspiracy to distribute methamphetamine and various related charges. Trial commenced on July 8, 1983 before the Honorable Louis H. Pollak, sitting without a jury. On July 18, 1983, John DiSalvo was found guilty on one count of violating 21 U.S.C. §846 (conspiracy) and on three counts of violating 21 U.S.C. §843(b) (unlawful use of a communication facility) and was subsequently sentenced to eleven years incarceration followed by four years probation. His conviction was affirmed by judgment order on June 21, 1984 by the United States Court of Appeals for the Third Circuit which denied rehearing en banc on August 14, 1984. By order dated September 6, 1984, issuance of the

mandate was stayed to October 13, 1984 pending petition to this Court for a writ of certiorari.

II. Summary of the Facts

This case constitutes a rare instance in which the government's evidence at trial consisted of little else but intercepted conversations obtained pursuant to a court-authorized wiretap. As to John DiSalvo, the government's direct evidence consisted only of five telephone conversations, the facial contents of which were absolutely innocuous, and his subsequent possession of two scientific equipment catalogs. No other direct evidence was presented against John DiSalvo.

On June 28, 1982, the following conversation occurred between John DiSalvo* and Joseph Maleno, an alleged coconspirator:

---

*"D" indicates John DiSalvo as the speaker; "M" refers to Joseph Maleno.

D: Hello.

M: What is it big man?

D: Hey, finally got home huh? Uh, you gonna be home tomorrow?

M: Yea.

D: Uh, I'm definitely gonna see you tomorrow. I gotta meet my, meet, meet a friend a mine that's comin' into town about twelve o'clock. So I should be seeing you about twelve thirty.

M: Well uh, I'll have to be in South Philly and you call that number.

D: Well, uh...

M: And I'll come right up.

D: Well, uh, if you're up here I'll, I'll be back at, by twelve thirty. I mean...

M: I, I have to be down there at nine.

D: Right. What time you comin' back up?

M: Well, I wouldn't come back till six. But if you want me twelve, you call me there and...

D: Alright, I'd want you about twelve thirty is when I wanna see you.

M: Oh, is that, you want, you see me there at twelve thirty?

D: Yeh.

M: I'll see you there twelve thirty.

D: Okay.

M: Okay buddy.

D: So long. (7-8SA)**

The following day, two calls were intercepted between DiSalvo and Maleno. At 2:00 p.m. the following conversation was recorded:

M: Hello.

D: Joe?

M: Yeh.

D: What happened?

M: Whatta you mean?

D: I'm sittin' here an hour waitin' for you.

M: I don't believe it.

D: I told you.

M: I thought you were gonna call me.

**"SA" refers to Supplemental Appendix in court below; "a" refers to the joint appendix filed in the court below; "A" refers to the appendix attached to this petition.

D: No, I told you in a half hour.

M: I, ah, yeh but I still thought you were gonna call me. I'm sorry, I'll be right there.

D: Alright. (9SA)

Twenty-six minutes later, the following conversation was intercepted:

D: Beauty Motors.

M: Yeh, John.

D: Yeh.

M: How you doin' buddy?

D: Alright.

M: You were right. It's extremely wet.

D: Okay.

M: Alright pal.

D: Alright listen.

M: Yeh.

D: When can I talk to you?

M: Um, let me call you in the morning. I may call you tonight.

D: Yeh, because I told you that the other guy's comin' in the morning too, them other two guys.

M: Uh huh.

D: So, uh, you know, if I can uh (unintelligible).

M: Well just, let me see how fast I can run.

D: Good enough.

M: I'll get in touch with you.

D: So long. (10SA)

The government stipulated at trial that the weather report for June 29, 1982 revealed that it had rained in Philadelphia on that date prior to the 2:26 p.m. conversation.

The last two conversations occurred on June 30, 1982. At 11:11 a.m. the government intercepted Maleno's call to DiSalvo:

D: Hello.

M: Big Man.

D: Big Man.

M: You know John, now that I'm a cabaret owner again....

D: Cabaret owner

M: I mean, you know, I got....

D: That means I gotta give you a play, huh.

M: I got things to do. That's your phone, ain't it?

D: Yeh. That was, that was somebody I just hung up on.

M: Uh, one down and one to go.

D: Uh, okay listen.

M: Can I say something?

D: Yeh.

M: Uh.

D: Would you want to come over here? (Unintelligible.)

M: Uh, I can't because uh, it's coming from downtown yet.

D: Oh, okay.

M: It may be here in a half hour. I don't know when.

D: Alright, if it is, gimme a call. If not, uh....

M: You gonna be around for awhile?

D: Yeh, I'm gonna shave and all. I'll be here for an hour.

M: Are you going to that other number?

D: Yeh, that, that's what I was gonna tell you but I....

M: The cars?

D: Yeh, I'm gonna see them other guys, yeh.

M: Alright no, alright, could I say this. Can't we do this tomorrow? I, I don't care.

D: Well, what's the difference?

M: Alright, well, uh because uh

D: (Unintelligible)

M: Then I get pressed for time.

D: Well, here's what, don't get pressed for time.

M: Yeh well I, it's in my own head.

D: There's two other guys comin' in to, this afternoon and I want, I want you to meet them guys.

M: Okay.

D: Okay.

M: Alright.

D: But uh (unintelligible.)

M: That's good to hear.

D: That other business yesterday we can take care a that tomorrow, right?

M: Well one's today.

D: Alright, okay.

M: When uh, soon as it arrives. I'll call you home or at the car place.

D: Okay, no wait a minute now my friends is gone, I'm gonna meet 'em about two thirty, somethin' like that.

M: I'm gonna be home. I ain't going down.

D: Alright, then I call you and then I'll let, then I'll make arrangements uh, and I'll bring them guys down to see you, okay?

M: Okay pal.

D: Alright then.

M: Alright John. (11-13SA)

Shortly after 2:00 p.m. that day DiSalvo called Maleno:

M: Hello.

D: Hey Joseph.

M: Hi buddy.

D: How you doin'?

M: Alrighty.

D: How'd you make out?

M: I, I did what I had to do.

D: Yeh.

M: I told you it was comin' up.

D: Oh you got it?

M: One.

D: Uh, yeh you got one uh?

M: Yeh.

D: I'm gonna go see these guys.

M: Yeh, oh you want it now.

D: I'm comin' up that way. So, I'll stop by your house.

M: Fine.

D: Okay, and then I'm gonna meet you a little later.

M: (Unintelligible.)

D: (Unintelligible.)

M: You gonna come up the street?

D: I'm comin' right up there now.

M: Uh, tap the horn and I'll be there.

D: Okay.

M: Right.

D: So long. (14SA)

It is these conversations which the government contends establish John DiSalvo's membership in a conspiracy to distribute methamphetamine.

Agent Ellis Hershowitz, Drug Enforcement Administration, was permitted to testify that he interpreted the foregoing conversations to refer to drug transactions. Agent Hershowitz testified that when John DiSalvo referred to meeting with "two guys", he really was using a code language and that the words used were not intended to convey their ordinary meanings. Rather, Agent Hershowitz contended, DiSalvo was talking about two pounds of methamphetamine. (420-23a) However, Agent Hershowitz admitted that his ability to "interpret" the meaning of the conversations was not based upon any particular knowledge gained by his years of experience in investigating controlled substance transactions; rather, he admitted that his interpretation of the content of any one conversation was based solely upon his understanding of the content of the alleged co-conspirators' conversations to which John DiSalvo was not a party. (567-68a; 581-82a; 676-78a)

Understandably, the government admitted below that it relied "almost solely" on the foregoing conversations as proof of DiSalvo's participation in the conspiracy. (Government's brief at 74-75) The only other trial evidence was the testimony of an F.B.I. agent that three months after the last DiSalvo-Maleno conversation, John DiSalvo was seen to possess two scientific equipment catalogs at a time when DiSalvo was in the company of a person not alleged to be a coconspirator. (688-89a)

Upon this evidence alone, John DiSalvo could not have been convicted and could not have been shown to be a member of the conspiracy. Only by considering the content of the alleged coconspirators' statements, the trial judge found DiSalvo to be a member of the conspiracy and guilty of all charges.

ARGUMENT

There Was Insufficient, Independent Non-Hearsay Evidence Of DiSalvo's Participation In A Conspiracy To Justify Admitting In Evidence Alleged Coconspirator's Statements Without Which There Was Insufficient Evidence Of Guilt

The intercepted conversations of John DiSalvo standing alone do not evidence any criminal activity on his part nor participation in any conspiracy to distribute methampheta-mine. Nor does his possession three months later of two catalogs from companies selling scientific equipment constitute evidence of any conspiratorial participation on his part.

It is conceded by all parties in this case that the Court of Appeals for the Third Circuit was correct in summarizing the law in all federal jurisdictions when it reaffirmed in United States v. Ammar, 714 F.2d 238, 245 (3d Cir. 1983):

> "A coconspirator statement may be admitted under Fed.R. Evid. 801(d)(2)(E) if it meets

> three conditions: (1) there must be independent evidence establishing the existence of the conspiracy and connecting the declarant and defendant to it; (2) the statement must have been made in furtherance of the conspiracy; and (3) it must have been made during the course of the conspiracy." (Citation omitted.)

Thus, before any conversations between alleged coconspirators other than John DiSalvo could be admitted against him, there had to be independent, non-hearsay evidence of DiSalvo's participation in the conspiracy. His own conversations were wholly innocent and could not constitute the requisite independent, non-hearsay evidence of his participation. The trial judge found that "(t)hey are on their face apparently innocuous conversations." (939a)

In Glasser v. United States, 315 U.S. 60, 74, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942) this Court held that declarations of coconspirators "are admissible over the objection of an

alleged co-conspirator who was not present, when they were made, only if there is proof aliunde that he is connected with the conspiracy." Black's Law Dictionary, Revised Fourth Edition, 1968, defines "aliunde" as follows: "From another source; from elsewhere; from outside." Many courts have interpreted Glasser to prohibit any attempt to rely on the hearsay utterances themselves as proof of the conspiracy or of a defendant's participation in it. See United States v. DeFillipo, 590 F.2d 1228, 1235-36 (2d Cir.), cert. denied, 442 U.S. 920, 99 S.Ct. 2844, 61 L.Ed. 2d 288 (1979); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed. 2d 539 (1970). The Fourth Circuit Court of Appeals has reasoned that "(i)ndependent evidence is evidence other than the alleged co-conspirator statements themselves. 'Otherwise hearsay would lift itself by its own boot-

straps to the level of competent evidence'." United States v. Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980) quoting from Glasser v. United States, supra, 315 U.S. at 74-75. See also, United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976) ("There must be proof from another source of the existence of the conspiracy and of [the defendant's] connection with it."); United States v. Peterson, 549 F.2d 654, 658 (9th Cir. 1977) ("[H]earsay declarations cannot serve as the requisite independent evidence of participation in the conspiracy.")

Several decisions of the Third Circuit Court of Appeals may be read to prohibit any use of the coconspirators' statement absent proof aliunde of the existence of the conspiracy and the defendant's participation in it. In United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976), Glasser was interpreted as follows: "The common enterprise cannot be established solely by the words of the self-

proclaimed participant...." And in In Re Fine Paper Antitrust Litigation, 685 F.2d 810, 820 (3d Cir. 1982) the Court held that "(e)vidence of extra-judicial statements made by alleged coconspirators may be admitted upon the court's finding that there is a sufficient showing of a common enterprise by means of evidence independent of the proferred declaration." The Second Circuit's requirement in United States v. Geaney, supra, at 1120, that the defendant's participation must be proved by evidence independent of the hearsay utterances was cited with approval in United States v. Continental Group, Inc., 603 F.2d 444, 456 (3d Cir. 1979), cert. denied, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed. 2d 668 (1980) and in United States v. Trowery, supra. See also Government of the Virgin Islands v. Dowling, 633 F.2d 660, 665 (3d Cir. 1980). Hence, the foregoing decisions and

their underlying rationales may be read to preclude any use whatsoever of the statements until his participation in the conspiracy has been shown by wholly separate and independent means. However, if these cases may not be read so broadly as to prohibit any use of the statements, but rather, to prohibit admission of their contents, the trial judge's consideration of the alleged coconspirators' statements was still erroneous.

Even though defense counsel objected to the utilization of alleged coconspirators' statements without proof aliunde of DiSalvo's participation in the conspiracy (719a; 879a), the trial court considered the contents of conversations between alleged coconspirators other than DiSalvo for the purpose of interpreting DiSalvo's conversations in a criminal context. (A-6/27) So that this Court might fully review the trial court's analysis of the conspiracy charge, Judge Pollak succinctly summarized as follows:

> "The evidentiary use I have made of the conversations in which the charged person was not a participant was a use which did not involve relying on the recitals in those other conversations for the truth of what was recited, and thus the hearsay objection which otherwise would be proper is in my judgment obviate; that is to say, those conversations to which persons other than the defendant who was charged by the Government to be a conspirator, were looked to not for the truth of what was asserted to locate the defendant in the conspiracy, but to place in context and give clarification to the meaning to be assigned to otherwise ambiguous conversations that the charged defendant, in this instance Mr. DiSalvo, was clearly a participant in." (950a)

In United States v. Reynolds, 715 F.2d 99, (3d Cir. 1983), the court reversed a conviction in which a statement of an alleged coconspirator had been admitted upon the government's urging that it was not offered for the truth of the matter asserted. Reynolds and Parran were charged with conspiracy to possess a stolen Pennsylvania unemployment

compensation check and to utilize the social security number of the payee of the check as well as the substantive offenses constituting the objects of the conspiracy. The evidence showed that Postal Inspectors observed Reynolds and Parran leave a studio after having obtained a photo I.D. card for Reynolds under suspicious circumstances. The two were seen looking at the card and conversing as they walked down the street. Parran walked away when Reynolds entered a bank and attempted to cash a stolen check using the I.D. card. Reynolds was arrested upon leaving the bank; as Parran approached, Reynolds said "I didn't tell them anything about you." Id. at 101. Although the government argued that the statement was not hearsay because it was not offered for the truth of the assertion that Reynolds had not told Postal Inspectors anything about Parran, the appellate court rejected the government's contention that the statement was mere evidence of the existence

of the conspiracy charged and the joint participation of the defendants in the substantive offenses. After a comprehensive and well-reasoned review of the rationale underlying the exclusion of hearsay statements, the court concluded that even if the statement were not offered to prove the truth of the express assertion which it contained, it was offered for the truth of the implied assertion that Parran and Reynolds were jointly involved in a criminal undertaking about which Reynolds had not told the Postal authorities.

> "...(S)tatements containing express assertions may also contain implied assertions qualifying as hearsay and susceptible to hearsay objections. This situtation arises when 'the matter which the declarant intends to assert is different from the matter to be proved, but the matter asserted, if true, is circumstantial evidence of the matter to be proved. In this situtation too, the statement is subject to a hearsay objection.'"

Id. at 103. (Citations omitted.)

The Court found that Reynolds' statement was not offered merely to prove that Reynolds could speak, or that he could speak English, or even that he spoke to Parran. "Instead, the government offers it to prove the truth of the assumed fact of defendant's guilt implied by its content." Id. at 103. The erroneous admission of the hearsay statement resulted in actual prejudice to Parran in view of the marginal nature of the remaining evidence against him in the joint trial in which his codefendant did not take the stand. Error of such magnitude required the reversal of Parran's convictions and a new trial on all counts. Id. at 105.

As recognized in Reynolds, supra, an utterance may be offered as evidence of a fact without regard to the content of the utterance, e.g. that a person can speak or that he can speak English. However, in this case, the contents of the intercepted conversations of DiSalvo's alleged coconspirators contained

factual assertions subject to verification. In truth, it was the content of the conversations which the trial judge looked to in determining that the speakers were engaged in conversations concerning the distribution of methamphetamine. Only by concluding that those persons in fact expected to receive two pounds of methamphetamine could the trial judge have determined that DiSalvo was participating in that conspiracy when he said that two guys were coming to town to see him and really meant that he was obtaining two pounds of methamphetamine. Moreover, if the contents of the many conversations were not offered for their literal truth (that Maleno expected to receive two pounds of methamphetamine) they were most certainly considered for the implied assertion that Maleno was in the business of dealing in controlled substances and that DiSalvo was a participant. Admissibility of that implied assertion is strictly prohibited in Reynolds.

In United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983), the government sought to introduce the customer book of a deceased cocaine dealer against a defendant charged with conspiracy and possession of cocaine. The government contended that the book was non-hearsay evidence since it was not offered for the truth of the assertion that Garcia-Duarte was a customer of the deceased. Rather, the government contended that the book evidenced the fact that "someone" had dealings with the cocaine dealer and that other evidence would show that the defendant was that "someone". The Second Circuit Court of Appeals rejected the argument. "To the extent that the customer book was introduced to prove that [the deceased dealer] had narcotics dealings at all, whether with Garcia-Duarte... or someone else, its evidentiary significance depended solely on the truth of the matter asserted." Id. at 46. As such, the evidence was hearsay and should have been excluded.

If DiSalvo's alleged coconspirators' conversations were offered to show that the speakers were dealing in controlled substances or even that they were discussing particular quantities or the quality (wet or dry) of substances, the conversations were most definitely offered for the truth of the explicit and implied assertions contained therein.

Without reference to the conversations of alleged coconspirators, there is insufficient evidence from which to conclude that John DiSalvo participated in the conspiracy or that he unlawfully used communications facilities. The trial judge observed that DiSalvo's conversations were at most ambiguous and perhaps innocuous.

> "While '[j]udges are not required to exhibit a naivete from which ordinary citizens are free,' United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977), neither are we permitted to read evil meaning into the words usually having an innocent connotation, absent proof...that they were part of a secret code."

United States v. Terry, 702 F.2d 299, 321 (2d Cir. 1983).

The only independent, non-hearsay evidence of DiSalvo's participation consisted of his own conversations which the trial judge concluded were innocuous without reference to the coconspirator statements. The trial judge found DiSalvo's statements sufficient to place him in the conspiracy; that conclusion was reached only after considering the content of the coconspirators' statements in order to determine what DiSalvo's facially innocuous statements really meant. The conclusion that the coconspirators' statements were in fact improperly considered for the truth of their contents is unavoidable.

Because the Court of Appeals for the Third Circuit departed from its own prior decisions as well as those of most of the circuits throughout this country, a writ of certiorari should issue. Alternatively, due to the novel reasoning of the trial judge in

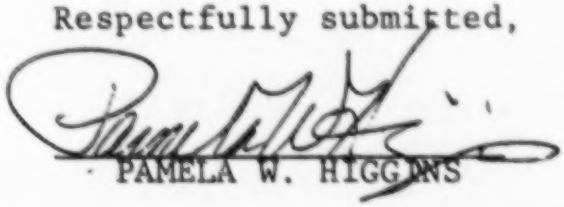
using coconspirator statements for "contextualizing" purposes, this may be a case of first impression which raises a legal issue of major significance which, if not promptly resolved, could seriously and further erode the rights of citizens tried in our criminal courts.

Since there is a split of authority among the circuits as to whether hearsay statements themselves may be considered in determining their admissibility, United States v. Coe, 718 F.2d 830, 836 n. 4 (7th Cir. 1983), this Court should decide the question and resolve that decisional variance.

CONCLUSION

For the foregoing reasons, this Court is urged to issue a writ of certiorari to the Court of Appeals for the Third Circuit to review its judgment at No. 83-1756.

Respectfully submitted,



PAMELA W. HIGGINS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1756

UNITED STATES OF AMERICA

v.

DiSALVO, JOHN,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 83-00041-01)
District Judge: Honorable Louis J. Pollak

Argued: June 18, 1984

Before: ALDISERT, HIGGINBOTHAM and ROSENN,
Circuit Judges.

JUDGMENT ORDER

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and

was submitted under Third Circuit Rule 12(6) on June 18, 1984.

Appellant, John DiSalvo, claims that there was insufficient evidence upon which to base verdicts of guilty and that there was insufficient, independent non-hearsay evidence of DiSalvo's participation in a conspiracy to admit alleged coconspirator's statements.

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court is hereby affirmed.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: June 21, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1756

UNITED STATES OF AMERICA

v.

DiSALVO, JOHN,

Appellant.

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.

The petition for rehearing filed by JOHN DiSALVO, Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: August 14, 1984

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1756

UNITED STATES OF AMERICA

vs.

DiSALVO, JOHN, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 13, 1984.

/s/ A. Leon Higginbotham

Dated: September 6, 1984

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	Criminal Action
vs.	:	No. 83-41
	:	
JOHN DiSALVO, et al	:	

Philadelphia, Pennsylvania
July 15, 1983

Before: Honorable Louis H. Pollak, J.

Excerpts From Trial Testimony
at pp. 755-778

THE COURT: We have had a Bench trial with respect to four defendants: John DiSalvo, Joseph Maleno, Dominic Florio and Ralph Pultrone. I am going to state first what the verdicts are and then I will add a word or two by way of explanation of my thinking as to certain issues.

I take the four defendants in sequence as they are listed in the caption of the indictment. With respect to John DiSalvo, Count I charges his participation in a conspiracy to distribute methamphetamine in violation of 21 U.S.C. Section 846. On Count I, I find Mr. DiSalvo guilty.

Mr. DiSalvo was also charged under Counts 32, 34 and 36, with use of a telephone, which is to say a facility of communication, in violation of 21 U.S.C. Section 843(b); that is to say, the use of a facility of communication to facilitate the commission of a felony under this chapter of the Criminal Code relating to drug offenses. On Counts 32, 34 and 36, I find Mr. DiSalvo guilty.

* * *

Now, let me say a word or two about the findings I have made. The primary issue which was common to all the defendants was that of participation in a conspiracy to distribute methamphetamine as charged by the Grand Jury. The proof offered by the Government was, in overwhelming part, the tape recordings of intercepted telephone communications, telephone conversations which, for the most part, involved these defendants and frequently other persons, co-defendants who are not on trial today, or other persons, unindicted coconspirators; sometimes persons whose identities were not known.

There was some additional testimony of which the most important element was the testimony of the case agent, Agent Hershowitz, who, over substantial defense objection, was permitted to testify as to his interpretation of many of the conversations which were recorded. Agent Hershowitz was sought to be

qualified by the Government and I concluded properly so as an expert with respect to the drug trade, a trade which he has been investigating for many years.

The critical question of course in a conspiracy case is that of determining in the first instance whether there is a conspiracy, and second, if there be a conspiracy who the participants are, and then of course whether the Government has succeeded in demonstrating an overt act or acts done in furtherance of the conspiracy in the time period charged.

* * *

We are all familiar with the proposition which is basic to conspiracy law, that proof of participation in a conspiracy must be demonstrated by evidence beyond a reasonable doubt, apart from, independent of, or as lawyers would have it, aliunde, the coconspirator conversations. That is to say, one cannot bootstrap a conversation between B and C in which B and C talk about what A is doing into

evidence that A is in fact a participant in the conspiracy. That is to say, what is stated in the B/C conversation cannot be relied on for the truth of what is attributed to B or C as declarant to be then lodged against A until A is independently identified as a member of a conspiracy that embraces B and/or C. Anything said by B and/or C, an alleged coconspirator, is hearsay to A. It is only after the fact-finder has determined that A is indeed identified as a member of the conspiracy, that what is said by B or C, if they are independently identified as members of the conspiracy, is attributable to A and no longer hearsay.

* * *

Now I turn to the charges against John DiSalvo. The conversations to which John DiSalvo was a participant were three in number. They were all conversations with Joseph Maleno. Those conversations were numbered 57, 59 and 62. They took place on June 29 and June 30th, 1982. They are on their

face apparently innocuous conversations.

In placing Mr. DiSalvo as a coconspirator with Joseph Maleno, we are not met, as we were with Joseph Maleno, Ralph Pultrone and Dominic Sonny Florio, with any question as to the identity of the persons who the Government, through the testimony of Agent Hershowitz, asserts is John DiSalvo. We are not met with that question of identification because Mr. DiSalvo has, through his counsel, acknowledged that indeed he was the speaker on the recorded conversations. The conversations were, in the first instance, to Beauty Motors, a concern of which Mr. DiSalvo spent at least some part of his business hours; No. 59 was a call by Mr. Maleno to Mr. DiSalvo; No. 62 was a call, incoming from Mr. DiSalvo to Mr. Maleno at Mr. Maleno's telephone which was tapped. The question is whether these innocuous-sounding conversations were only innocuous or whether, as the Government charges, they were conversations that dealt with the distribution of

methamphetamine.

Here again, in concluding that they are indeed inculpatory and inculpatory beyond a reasonable doubt, I rely on the opinion of Agent Hershowitz about words which on their face are not necessarily criminal-sounding words, and I rely for confirmation on other conversations very close in time after the middle by which I found conversation as to the incriminating nature of conversation No. 77 attributed to Mr. Florio as compared with conversation No. 78 to which he was not a participant, because I think it important that the findings with respect to Mr. DiSalvo, as well as with respect to the other defendants, be understood, and because with Mr. DiSalvo's case the conversations taken in isolation may appear to [the] casual auditor to be the least incriminating, I will offer a couple of examples of the bases which lead me to the findings that these are inculpatory conversations.

I say, I think it important to do this, important particularly because so much of this case in argumentation has involved defense challenges, vigorously and intelligently pursued to the mode of proof pursued by the Government here, that I think it proper that the defendants, because of the special subtlety of the matter of his conversations, particularly Mr. DiSalvo, be in a position to be able to show to a higher court, if as I suppose likely these verdicts are appealed, what the nature of the findings is which has commended itself to me as supporting the determination of guilt beyond a reasonable doubt.

In what I am about to give as examples, they are not to mean to be exhaustive, but they will show the method.

Let me consider the first conversation in point of time between Joseph Maleno and John DiSalvo. June 29 at 1426, which is to say 2:26 in the afternoon, Joseph Maleno calling

Mr. DiSalvo. Mr. DiSalvo says, towards the end of this very brief conversation, "When can I talk to you?"

Joseph Maleno: "Let me call you in the morning. I may call you tonight."

Mr. DiSalvo: "Yeah, because I told you that other guy's coming in tomorrow morning too, them other two guys."

Mr. Maleno: "Uh huh."

And so, it is left Mr. Maleno is to get in touch with Mr. DiSalvo.

In conversation 59, which takes place on June 30, at a little after 11 o'clock in the morning, Mr. DiSalvo says to Mr. Maleno: "There's two other guys coming in to, this afternoon, and I want, I want you to meet them guys." And Maleno says, "Okay." And DiSalvo says, a little later on: "Okay. No, wait a minute now, my friend is gone. I am going to meet them about 2:30, something like that." Mr. Maleno: "I am going to be home." And then

arrangements are made to talk further.

Later that day, in the third of the conversations on June 30th, this time at 2:09, 1409 hours, Mr. DiSalvo is again saying, "I'm going to see those guys." Now, what is incriminating, if anything, about a conversation about some guys coming in, some guys who Mr. DiSalvo says he wants Mr. Maleno to meet, Mr. Hershowitz testifies that "guys" means pieces of methamphetamine. Well, maybe that is a meaning in some context, but it is not the primary meaning of the word. Why should we attribute a special meaning here. Well, on the 30th of June, at 1307, which is just about two hours after the second conversations between Joseph Maleno and John DiSalvo, Joseph Maleno is talking to John Maleno, his nephew, an indicted coconspirator not in this trial, and Joseph Maleno says, "You know, John said he probably wants to see me about 2:30."

John Maleno: "2:30?"

Joseph Maleno: "And I said to him I just as soon do that tomorrow. He said, well, he wants me to meet a couple new guys. So, it must be something different." And, at 1602 hours, 4 o'clock in the afternoon, which is two hours after the third of the conversations between John DiSalvo and Joseph Maleno, we have Joseph Maleno saying again, "John has been in touch. He said he'll probably see me about 5:00."

Now again, these confirmations are not important for the truth of what is asserted. They are confirmations which are important because they show that in context, when Joseph Maleno is talking to John Maleno in a conversation which is rife with other references to what I find to be undertakings to distribute methamphetamine, he imports John, who I find to be John DiSalvo, the only other John, except for John Maleno to whom he is talking and an occasional other relative, he imports John, and the reference is to the conversations

which he has just had with John DiSalvo, repeating the very kinds of things which he and John DiSalvo had under discussion. And so, I find there confirmation for Agent Hershowitz' expert interpretation of the DiSalvo/Joseph Maleno conversations.

The same kind of analysis yields the same result with another dimension. At the very beginning of the first conversation on June 29 between Joseph Maleno and John DiSalvo, Joseph Maleno says, after the exchange of hellos, "You were right, it's extremely wet." And John DiSalvo says, "Okay," and Joseph Maleno says, "All right, pal." And then John DiSalvo says, "All right, listen." And then the conversation goes forward and begins to turn to the two other guys.

Wetness, according to Agent Hershowitz, is a common term in the trade referring to what sometimes happens to methamphetamine, somewhat to the detriment of its quality, so it represents a business problem. Why should we

attribute that highly specialized usage of the common term "wetness" to the John DiSalvo/ Joseph Maleno conversation? Why, indeed, especially when, as testimony from Mr. DiSalvo demonstrated, June 29, the date of the conversation was a date when, according to local climatological data for Philadelphia, Pennsylvania, issued by the United States Department of Commerce and reflecting findings at the Philadelphia International Airport, June 29 was a date of substantial precipitation? Does the exchange, "You were right, it's extremely wet, okay," sound like an exchange about the weather? Possibly so.

When we look to conversation 58, which takes place half an hour later [than] the conversation between Joseph Maleno and John DiSalvo I just referred to, we find a discussion between Anthony Orlando and Joseph Maleno. Anthony Orlando is another indicted co-conspirator who is not on trial in this case.

Orlando has been talking to John Maleno -- first he has been talking to Joseph who then says, well, in effect, talk from now on to John, my nephew. Then Orlando asks if he could talk to Joe a minute. Then Joe comes on and Joe says, "Yeah, Ant." And Orlando says, "How's that look, all right?"

Joseph: "It's a little wet but look at the weather. It looks good to me."

"Yeah, anybody," says Orlando.

Joseph Maleno: "It's a little damp, huh?"

Orlando: "Anybody try it?"

Joseph Maleno: "No."

Orlando: "No?"

Joseph Maleno: "No. We passed that stage. I think I could tell this." And then there is something that is not intelligible.

Joseph Maleno: "I think from a block away I could tell it."

Orlando: "Yeah."

Joseph Maleno: "I think I could tell from a block away."

Orlando: "It'll dry out though?"

Joseph Maleno: "Yeah, I think it'll be all right. I think it's the weather today more than anything. Especially where they're coming from, you know. There was a driving storm and God knows what."

The weather, the apparent damp weather, is imported into this conversation, but as explanatory in part of the wetness of the stuff Joseph Maleno and Anthony Orlando are talking about.

Again it is not of importance for this purpose whether there was any truth in the matter asserted, that the stuff "it" was wet.

The sense in which the colloquy between Joseph Maleno and Anthony Orlando that I just read it is important to my findings is that they confirm the special usage by Joseph Maleno of the concept of wetness which Mr. Hershowitz says in his testimony should be concluded to be what was meant by Joseph Maleno when he said to John DiSalvo, "You were right,

it's extremely wet," and DiSalvo said, "Okay." That is to say, accepting that Joseph Maleno and Anthony Orlando, in talking about dampness, were talking about a piece of methamphetamine, whether or not it was damp, whether or not indeed there was a piece of methamphetamine, is not the point. But, accepting that understanding as to how the use of the words was between Joseph Maleno and Anthony Orlando, I think that it explains and confirms what the usage was which Joseph Maleno gave to the concept of wetness just a half-hour before in saying to John DiSalvo, "You were right," evidently referring to a prior exchange on that very concept, and John DiSalvo then saying, "Okay," to Joseph Maleno's acknowledgment of wetness.

The theme is confirmed again on June 30th, the next day, in a conversation between Joseph Maleno and John Maleno. It will be remembered that John was there when Joseph was talking to Anthony Orlando the previous day when Joseph

made the representations to Orlando about wetness, though he thought it could be cleared up.

After a reference to Sonny, "Sonny never called," says Joseph, John saying, "No," and Joseph saying, "But, I don't care," John Maleno goes on to tell his uncle, "I just picked that thing up over there earlier. It's, ah, you know, a little wet. I got it opened over here. I got it under my air conditioner."

Joseph: "Is it -- are you watching? Is it drying?"

John: "A little bit."

Joseph: "I don't know if heat --"

John: "Half an hour."

Joseph: "If heat or coldness will help it."

John: "Yeah, I said I got it near the air conditioner."

Joseph: "Yeah, I wonder if heat would help it more."

John: "Heat?"

Joseph: "A lamp." And then a gap. Then Joseph saying: "See, heat ain't the worst enemy, it's the wetness that hurts it. In other words, it was damp to start with and it was because of that, I think they travelled through that rain. First of all, I don't think it dried out enough." And then there is continuing discussion about wetness again in a context that seems to me impelling me to confirm that what has been discussed starting with the John DiSalvo/Joseph Maleno conversation, was wet methamphetamine.

One final example. In the second conversation between Joseph Maleno and John DiSalvo on June 30th at 1111, there is discussion in effect about when they can get together.
Joseph Maleno: "Are you going to that other number?"

DiSalvo: "Yeah, that's what I was going to tell you but I --"

Maleno: "The cars?"

DiSalvo: "Yeah, I am going to see those other guys."

Maleno: "All right. All right. Could I say this? Can't we do this tomorrow? I -- I don't care."

DiSalvo: "Well, what's the difference?"

Maleno: "All right, well, uh, because, uh --" And then something unintelligible by DiSalvo.

Maleno: "Then I get pressed for time."

DiSalvo: "Well, here's what, don't get pressed for time."

Maleno: "Yeah, well, I -- it's in my own head." And then the conversation proceeds to something I already quoted from DiSalvo's advising Maleno that two other guys are coming in. That conversation was at 1111 on June 30th.

At 1602, which is five hours later on the same day, Joseph is telling his nephew John -- John has told Joseph, his uncle, "Give the fucking bar up." Joseph's bar.

Joseph: "I'll get out of there, John has been in touch. He said he'll probably see me about 5:00."

John: "Okay."

Joseph: "But, I think it's the same."

John: "Oh."

Joseph: "So, it's neither here nor there. I told him earlier, I said if it is, I said, you know, I just as soon wait till tomorrow."

John said, "Yeah."

Joseph said, "He said, well, the opportunity's here now. I got the guy. I said, 'Well, I don't want no pressures.' He said you ain't got no pressures. But, ah, he was looking for that first one today."

The inference that Joseph was reechoing in talking to John what he and John DiSalvo had just talked about a few hours before, about pressures and time pressures, seems to me irresistible. It puts again in context the conversation between Joseph Maleno and John DiSalvo.

I have used these as examples of the bases for my findings of fact beyond a reasonable doubt that John DiSalvo was a participant in the same conspiracy of which Joseph Maleno was, in terms of acquaintance and ramification, the central figure. I have pursued those examples so that it will be plain to counsel, to the parties, and to a reviewing Court if there be one, the way in which I have analyzed the charges of conspiracy.

The evidentiary use I have made of the conversations in which the charged person was not a participant was a use which did not involve relying on the recitals in those other conversations for the truth of what was recited, and thus the hearsay objection which otherwise would be proper is in my judgment obviate; that is to say, those conversations to which persons other than the defendant who was charged by the Government to be a conspirator, were looked to not for the truth of what

was asserted to locate the defendant in the conspiracy, but to place in context and give clarification to the meaning to be assigned to otherwise ambiguous conversations that the charged defendant, in this instance Mr. DiSalvo, was clearly a participant in.